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No. 00-1488

IN THE
SUPREME COURT of the UNITED STATES

ARKANSAS DEPARTMENT OF EDUCATION,

Petitioner,

v.

JIM C. AND SUSAN C, INDIVIDUALLY AND AS PARENTS AND NEXT FRIENDS OF J.C., and

UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Arkansas Department of Education which receives federal financial assistance must conduct itself in accordance with the explicit conditions on the receipt of federal financial assistance set forth in a federal spending clause statute?

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BRIEF IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (App. 1a-15a) is reported at 235 F.3d 1089. The opinion of the panel (App. 16a at 35a-37a), acting by two judges under 28 U.S.C. §46(d), is reported at 189 F.3d 745 at 757-58. The memorandum opinion and order of the district court (App. 39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2000. The petition for writ of certiorari was docketed on March 27, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

COUNTER-STATEMENT

1.The district court held Section 504 enforcible, notwithstanding the Eleventh Amendment. Arkansas Department of Education's opening brief to the court of appeals nonetheless said, "It is not clear in the complaint that plaintiffs seek to bring a §504 action against A.D.E." (Appellant's Br.16) and did not brief the Spending Clause. It's Fed.R.App.P., Rule 10(b)(3) statement raised the Eleventh Amendment only as to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq.. It's subsequent joint motion to consolidate Jim C. with Bradley v. Arkansas Department of Education, which raised only IDEA (and which the Bradley appellees opposed), represented that "[t]he issues in the instant appeal and the Bradley appeal are identical. Both appeals were taken by the Arkansas Department of Education to determine whether the district court properly ruled that the Individuals with Disabilities Act (IDEA) may be enforced against a State employee sued in his official capacity." The Bradley brief, which the Jim C. parties adopted, addressed only IDEA. The United States addressed section 504 briefly. Arkansas Department of Education's reply addressed only IDEA.

2. Upon that confused and incomplete record, a two judge panel[1] misread Section 504's definition of program, transmuting the statute's singular—"program or activity

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[1] After Judge Kelly died, the panel decide the case under 42 U.S.C. §46(d) and 8th Circuit R. 47E.

means all of the operations of . . . a department, [an] agency, or [an] other instrumentality," 29 U.S.C. §794(b)—into the panel's plural: "Program or activity is defined broadly to include all of the operations of state departments, agencies, or instrumentalities." App. 37a; 189 F.3d at 757 (emphases supplied). The panel thus erroneously found that "with these provisions Section 504 mandates that Arkansas [as a whole, all of it] waive its Eleventh Amendment immunity to all claims arising under §504 if it receives any federal funding [any, for any purpose]" and, also erroneously, that "Arkansas [the whole, all of it] is forced to renounce all federal funding . . . if it does not want to comply with §504." Ibid.

Upon that predicate, the panel held that "Congress' imposition of such conditions on a state violates the Constitution because it amounts to impermissible coercion. Congressional imposition of such a condition does not give Arkansas, or another state, a meaningful choice regarding whether to receive federal funding and waive its Eleventh Amendment immunity to suits arising under §504 or reject funding and retain its Eleventh Amendment immunity to such suits."

3. En banc, the Court of Appeals reversed. It found that under the statutory definition, "the State itself as a whole is not a program or activity," "only the department or agency which receives or distributes the aid is covered," and "[t]he acceptance of funds by one agency leaves unaffected both other state agencies and the State as a whole." 3a-4a; 235 F.3d at 1081. Upon this predicate, the court of appeals en banc held the decision by the Arkansas Department of Education to accept federal education funds to be uncoerced and the Section 504 conditions germane to federal education funding. Relying upon Lane v. Peña, 518 U.S. 187, at 192 (1996), the court held Section 504's waiver provision (20 U.S.C. §2000-7(a)(1)) to be clear and unambiguous. The author of the en banc opinion was a member of the panel whose opinion was affirmed in South Dakota v. Dole, 483

U.S. 203 (1987). The minority of the court would have held the 504 conditions to be non-germane and coercive.

4. Petitioner sought no stay of the mandate pending its request for certiorari here. In consequence the mandate was returned, and on March 23, 2001 the district court granted summary judgment against plaintiffs and dismissed the complaint with prejudice. The district court subsequently denied plaintiffs' motion for reconsideration. Plaintiffs do not intend to file an appeal from the district court's decision.

REASONS FOR DENYING THE WRIT

1. This Matter is Not Worthy of Certiorari and Is Moot

The en banc decision below is not in conflict with any decision of any other United States court of appeals. It is the first and only court of appeals decision considering section 504 under the Spending Clause.

The absence of any factual record concerning federal financial assistance received by the Arkansas Department of Education, or concerning the Arkansas Department's decision to accept federal education funding makes this an inappropriate case for deciding the issues presented for decision here. Because Petitioner has been equivocal even about whether 504 is in the case, no question concerning section 504, the Eleventh Amendment, the Spending Clause, federal education spending, or the Arkansas Department of Education itself is adequately developed for resolution here.

Furthermore, this case and controversy is now over. After decision below en banc, Petitioner sought no stay of mandate pending application for certiorari. This case has gone to judgment and been dismissed with prejudice in the district court.

This is not a case which became moot before the court of appeals rendered its judgment or after this Court has granted

certiorari. Rather this case became moot after judgment in the court of appeals but before this Court has acted on any petition for certiorari.

In this circumstance, the rationale for vacatur does not apply and the Court should deny certiorari. A losing party has no right to Supreme Court review; review here is discretionary and exercised circumspectly. Sup.Ct.R. 10. If the Court would have denied certiorari in any event, there is no unfairness in leaving the lower court's decision intact. *See Note, Collateral Estoppel and Supreme Court Disposition of Moot Cases.* 78 Mich.l.Rev. 946, 953-58 (1980). As a general rule, where the judgment would not otherwise have been reviewed by the Court, vacatur would disserve the public interest by eliminating a judicial precedent that the judicial system regards as "presumptively correct," U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 26 (1994), and would give the Petitioner a windfall (of its own making) that it would not have received if the controversy had remained alive.

The Court has denied certiorari in a number of such cases. Velsicol Chemical Corp. v. United States, 435 U.S. 942 (1978); Electro-Voice, Inc. v. National Labor Relations Board, 519 U.S. 1055 (1997); Enron v. Power Marketing, Inc. v. Northern States Power Co., 528 U.S. 1182 (2000). See Robert Stern, *et al.*, *Supreme Court Practice* 724 and n.29 (7th ed. 1993) (Court has "seemingly accepted this suggestion of the Solicitor General that it need not consider the often difficult question of mootness at the certiorari stage when a case is otherwise not worthy of review. In such cases the Court will merely deny certiorari.")

The certiorari petition here should be denied because the decision below, in the end, would not have warranted review by the Court.

2. Germaneness and Non-Coercion

Petitioner does not challenge the unambiguous clarity of Section 504's statement of "the conditions upon which moneys shall be expended," United States v. Butler, 297 U.S. 1, 73 (1936), accompanying federal education funds which the Arkansas Department of Education has chosen to accept:

"No otherwise qualified individual with a disability . .. shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. §794(a) and (b).
and
"A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504." 42 U.S.C. §2000d-7; see 1986 U.S.C.C.A.N. 3554.

There can be no doubt that the Arkansas Department of Education is the program covered by section 504.[2]

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[2] The cognate statutes, Section 504, Title IX, and Title VI, do not bind solely federal expenditures which proceed from the act in which each appears—section 504 is in Title V, entitled "Rights and Advocacy," in the Rehabilitation Act of 1973, as amended; section 901, which contains counterpart conditions as to gender is in Title IX of the Education Act of 1972, as amended; section 601, containing counterpart conditions as to race, color or national origin, is in Title VI in the Civil Rights Act of 1964, as amended. Each binds federal financial assistance from whatever act such assistance arises.

Title IX has been held to be a valid Spending Power enactment, Grove City College v. Bell, 465 U.S. 555, 575-76 (1984); and the Court has repeatedly treated it as such. E.g.

Petitioners raise instead germaneness and non-coercion.[3] But the Court has been generous in its guidance on these matters and has not suggested that unambiguous conditions like those set forth here are beyond Congress' power. New York v. U.S. 505 U.S. 144, 167, 171-173 (1992); South Dakota v. Dole 483 U.S. 203 (1987); Massachusetts v. United States, 435 U.S. 444, 461 (1978); Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 295 (1958); Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 143-144 (1947); Steward Machine Company v. Davis, 301 U.S. 548, 589-590 (1937); Massachusetts v. Mellon, 262 U.S. 447, 482 (1923). Compare Board. of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 241 (1990); with City of Boerne v. Flores, 521 U.S. 507 (1997).

The test of germaneness, of course, is whether unambiguous conditions accompanying the grant of federal funds are related to the purposes for which the federal grants are made. Petitioner inverts the test. It is not, as Petitioner asserts (at page 9 n.3. next to last sentence), that "the

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Davis v. Monroe County Bd. of Educ., 119 S.Ct. 1661, 1669-70 (1999); Franklin v. Gwinett County Pubic Schools, 503 U.S. 60, 74-75 n.8 (1992). Title VI was held a valid Spending Clause enactment in Lau v. Nicholas, 414 U.S. 563, 569 (1974). And see Guardians Ass'n v. United States Civil Service Comm'n, 463 U.S. 582, 598-99 (1983); Cannon v. Univ. of Chicago, 441 U.S. 677, 708-09 (1979).

[3] They do so with no understatement: " court of appeals paid . . . only lip service"; "court of appeals . . . makes a mockery"; "reasoning that would make the Spending Clause virtually unlimited"; "case cries out," "eviscerates." Petition at 11& 6, 8 & 14.

[spending] programs" must be "related to assisting or preventing discrimination against the handicapped, the objective of section 504." Rather, such conditions must . . . bear some relationship to the purpose of the federal spending," New York v. United States, 505 U.S. 144, 167 (1992) (citing South Dakota v. Dole); ". . . condition grants under the spending power only in ways reasonable related to the purpose of the federal program," Massachusetts v. United States, 435 U.S. 444, 461 (1978): ". . . reasonably conditions relevant to federal interest in the project and to the overall objectives thereof," Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958) (all emphases supplied).

As ballast to Arkansas Department of Education's representation that "the vast majority of [its federal funding] has nothing to do with section 504's goal" (Pet. at 3) and "the vast bulk of federal funding of education serves entirely distinct purposes" (Pet. at 9), it constructs, Pet. at 9 n.3, a list of examples presumably chosen to demonstrate that the grant condition here is not related to the purposes of the education spending. Instead, they show the opposite.

The purpose of spending under the Higher Education Amendment of 1998, Title VIII, Part B,[4] which Petitioner uses for its first example, is "to increase participation of low-income students in advanced placement courses." The 504 condition upon this federal funding provides "no otherwise qualified individual with a disability shall, solely by reason of her or his disability . . . , be excluded from participation in [advanced placement courses], be denied the benefits of [advanced placement courses], or subjected to discrimination under [the advance placement courses]." This condition barring the exclusion of qualified students with a disability thus directly relates to—and advances—the federal interest in

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[4] Petitioner miscites the provision's codification. It is 20 U.S.C. §1070a-11 note. See also 112 Stat. 1808.

and the purpose of this federal funding—namely, as Petitioner itself identifies the purpose, to increase participation of low-income students in advanced placement courses.[5]

Likewise, with the seven other examples of federal funds for education which Petitioner arrays in its failed effort to suggest that the section 504 condition is not germane to the purposes federal education funding statutes are designed to advance. It may be that "none of these programs is even remotely related to assisting or preventing discrimination against the handicapped," Petitioner's backward way of

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[5] Petitioner may have chosen this example for its facial strangeness, its unlikeliness, to people who may not know disabled students and would expect disabled children can't benefit from advanced placement courses. But some can , for example, Garrett F., respondent in Cedar Rapids Community School District, v. Garrett F., 526 U.S. 66, 69 (1999), had severe orthopedic disabilities, but was very capable cognitively. There are many such students, with physical disabilities, learning disabilities, Asperger's syndrome, even Down syndrome, sufficient that in 1998 Congress amended the Individuals with Disabilities Education Act to require: "beginning at age 14 . . . a statement of the transition service needs . . . that focuses on the child's courses of study (such as participation in advanced-placement courses or a vocational education program)." 20 U.S.C. §1414(d)(A)(vii)(I)(parentheses in statute). See generally, *K.Kay (ed.), Uniquely Gifted: Identifying and Meeting the Needs of the Twice Exceptional Student* (Vocus Pub. 2000); S. Baum *Gifted and Learning Disabled: From Definition to Practical Intervention* (Creative Learning Pr. 1991); T. Ellston, "To Be Gifted and Learning Disabled: A Paradox?" in *Gifted Child Today v.16, n1, p.17 (Jan/Feb 1993)*; S. Baum, "Gifted But Learning Disabled: A Puzzling Paradox" in *Preventing School Failure*, v. 34, no.1, p.11(1989).

stating the test for germaneness and non-coercion (Pet. n.3), but preventing discrimination in these education programs against children with handicaps is related to the achievement of the educational purposes of each.[6]

The other condition here, if a department chooses to take education funds, it chooses also to abide by federal court enforcement of the condition that qualified children with disabilities can not be excluded therefrom, be denied the benefits thereof or be subjected to discrimination thereunder, is also plainly related to the achievement of those educational purposes.

As with germaneness, so with non-coercion. With its constantly repeated refrain throughout, "all federal funding"—"any federal funding"—"for any purpose," Petitioner obscures the difference between a condition that extends only to the federally assisted department and one that runs to all of Arkansas' programs irrespective of whether they receive funds, as if to clothe itself in the statutory mistake which the panel made.[7] Petitioner's coercion argument seems

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[6] Variously (Pet. n.3), "to foster bilingual education, ... to encourage school attendance by homeless students; . . . to provide for professional development of teachers; . . .to assist schools with large immigrant populations; . . . to address the special needs of migrant children [and those] of neglected or delinquent children; . . . and to combat drugs and violence in schools." Not to exclude qualified children with disabilities, and in one instance teachers with disabilities, is certainly related to and in each instance serves the educational purpose of the funding statutes.

[7] At its rhetorical height (Pet. at 12-13), the Petition employs the ambiguity of the collective phrase 'all state agencies': " . . . as permitted under the court of appeal's decision, the Congress could secure a de facto abrogation by

really to be about germaneness, for each time it argues coercion the argument resolves to 'that has nothing to do with disability.' If any issue of coercion, which Petitioner never pressed below, is present here, it is, given the undeveloped factual record, not well-presented.

Petitioner seeks to present to this Court a very different case from that decided below. This truly is a case where, as the Court has often cautioned, "the argument as to coercion is shown to be more rhetoric than fact." South Dakota v. Dole, 483 U.S. at 211 (Rehnquist, J.), drawing upon Steward Machine Co. v. Davis, 301 U.S. at 589-90 (Cardozo, J.).

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imposing on all state agencies a Hobson's choice between forfeiture of every last nickel of federal funding, no matter how unrelated to the federal interest asserted in defense of the putative waiver." Pet. at 12. "But under the court of appeals' decision, Congress could compel the States to do all of these things and more—by subjecting all of their agencies to non-germane and coercive funding conditions." Pet. at 13.

CONCLUSION

For the above stated reasons, the C. family respectfully requests that the Court deny a writ of certiorari here.

Respectfully submitted,

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